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Attorney for Defendant MICHAEL KAIL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL KAIL,

Defendant.

Case No. 18 CR 172 BLF

**DEFENDANT MICHAEL KAIL'S REPLY TO
GOVERNMENT'S SENTENCING MEMO**

Hearing Date: TBD
Time: TBD
Dept: Courtroom 3, 5th Floor
Judge: Hon. Beth Labson Freeman

This reply memorandum is intended to address and clarify a few of the government's allegations in its Sentencing Memo (Dkt. 270) and to clarify Mr. Kail's assets. To the extent it is relevant, Mr. Kail did make disclosures to Yahoo! and never violated any of their policies.

A. Mr. Kail Made Disclosures to Yahoo!

The government alleges that Mr. Kail engaged in a "pattern of fraud and deceit" because he failed to notify Yahoo! of relevant advisory positions. This is not correct. First, Mr. Kail did not accept a position at Yahoo! before resigning from Netflix. *See* Dkt. 270 at p. 8:18-19. He resigned from Netflix on July 16, 2014. His last day at Netflix was August 1, 2014. Mr. Kail believed he was going to go work for Fanatics. He then unexpectedly interviewed with Yahoo! on August 2, 2014. Two days later, on August 4, 2014, Mr. Kail accepted the Yahoo! offer.

Second, after he filled out the initial paperwork (August 5), he later submitted a supplemental

disclosure outlining his advisory positions, although, it is clear from the documents that only “activity related to or potentially related to Yahoo’s business” needed disclosure. *See* Gov. Exh. 1. Dkt. 270-1, p. 28 (“Generally, outside employment with a Yahoo competitor is not permitted”). In other words, Mr. Kail was obligated to disclose employment that was potentially competitive to Yahoo!’s business. In any event, Mr. Kail, after the flurry of a quick offer and acceptance, did go back and amend the paperwork, which he does not currently have, but believes it should be in the possession of Yahoo!.

Not only that, Mr. Kail regularly made disclosures to Yahoo! as advisory or board positions arose. Attached Exh. A-1 is a representative example of such disclosures.

Finally, when Mr. Kail was terminated from Yahoo! – due to Netflix’s allegations – they completed a full audit of Mr. Kail’s employment and positions. They found no wrongdoing and provided him with full severance.

Therefore, the government’s fixation on Yahoo! is unjustified and appears to be nothing more than an effort to distract from the Section 3553(a) factors weighing in his favor.

B. Mr. Kail’s Assets are Overstated in the PSR

The Government alleges that Mr. Kail used the proceeds of his fraud to buy “houses in expensive neighborhoods and other luxuries.” *See* Dkt. 270 at p. 1. What houses? What luxuries? As reported in the PSR, Mr. Kail and his family live in a 2,185 square foot house and share one vehicle. PSR ¶ 51. His children attend public school. Any home in the Bay Area is pricey, and as noted by the government, Mr. Kail took out an interest-only loan to purchase a home near Netflix. The government’s effort to paint Mr. Kail as someone who engaged in fraud as evidenced by an extravagant lifestyle falls flat.

Additionally, the PSR overstates his assets by over \$2 million. The Charles Schwab “securities” which the PSR lists as totaling \$2,233,730.59 is *duplicative* of the Charles Schwab (“savings type account) listed as totaling \$2,120,273.89. These line items are the *same thing*. When Mr. Kail reported his bank accounts (Section A of the PSR packet), he included his Charles Schwab investment account. He was then asked to *specify* his securities in Section B of the PSR packet. Thus, he then listed all of the securities held in that *same* Charles Schwab account. The approximate \$2 million is one investment account in Charles Schwab, consisting of five different stocks. Therefore, his overall assets must be reduced by at least \$2 million.

1 Further, since Mr. Kail submitted the value of his stock holdings (held in a Charles Schwab
2 account), the number has fallen: Sumologic, Beachbody and Peloton stock are down significantly, and all
3 continue to fluctuate. His retirement holdings are also subject to fluctuation and of course, if withdrawn
4 prior to age 59 ½ will be taxed at 10 percent, plus income tax. And finally, the SVB Savings account
5 should reflect a balance of \$619,607 *less* due to a tax payment by Mr. Kail this month.

6 His family is living off their (not exorbitant) savings.

7 **CONCLUSION**

8 This Court should consider Yahoo! only to the extent that it shows Mr. Kail took measures to
9 ensure that Yahoo! was fully informed of his advisory and board positions. Unlike Netflix, Yahoo! had a
10 very clear process of documenting possible conflicts of interest, which Mr. Kail not only submitted, but
11 also made sure to clear with his superiors, colleagues, and the ethics and compliance department.

12 This Court should not enhance Mr. Kail's sentence because of the government's hyperbole as to
13 the harm Mr. Kail purportedly caused and should disregard the government's exaggeration of his net
14 worth and expenditures.

15 Dated: October 15, 2021

Respectfully submitted,

16 _____
17 /s/

18 Julia Jayne
19 Attorney for MICHAEL KAIL
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